

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

NORMAN WALKER, on behalf of himself)
and all others similarly situated,)
Plaintiff)

v.)

Docket No. 1:09-CV-190

TEACHERS INSURANCE AND ANNUITY)
ASSOCIATION OF AMERICA – COLLEGE)
RETIREMENT AND EQUITIES FUND)
(TIAA-CREF))
Defendant)

PLAINTIFF'S MOTION TO FILE FIRST AMENDED COMPLAINT

Plaintiff Norman Walker, by his attorneys, Gravel and Shea, moves under F.R.Civ.P. 15(a)(2) to file the First Amended Complaint, attached as Ex. 1. A red-lined version is also attached. *See* Ex. 2. The First Amended Complaint makes clear that Plaintiff seeks ERISA relief against TIAA-CREF both for breach of fiduciary duty and for engaging in prohibited transactions. It also names specific TIAA-CREF entities as Defendants, in addition to the TIAA-CREF group of companies. There are no additional factual allegations.

Rule 15(a)(2) states that leave to amend should be freely granted when justice so requires. The Second Circuit “allow[s] a party to amend its pleadings in the absence of a showing by the nonmovant of prejudice or bad faith.” *Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir. 1993). There is no possible prejudice to Defendants here, because Plaintiff is

merely clarifying his legal claims, not adding new factual allegations. Plaintiff is doing so in good faith.

Although this Court has dismissed Plaintiff's common law and state law claims on pre-emption grounds, they were dismissed without prejudice to Plaintiff's right to reassert them if his ERISA claims are subsequently rejected. *See* paper 34. Plaintiff reasserts such claims here in order to preserve them.

In accordance with Local Rule 7(a)(7), Plaintiff's counsel certifies that he made a good faith attempt to obtain the opposing party's agreement to this motion. As reflected in its counsel's letter dated December 10, 2010, Defendant does not oppose the filing of the amended complaint with respect to the new defendants or the additional ERISA claim. *See* Ex. 3.

However, it does not agree to the common law or state law claims. *Id.*

Dated: Burlington, Vermont
December 10, 2010

/s/ Norman Williams

Norman Williams, Esq.
Gravel and Shea, A Professional Corporation
P. O. Box 369
Burlington, VT 05402-0369
(802) 658-0220
nwilliams@gravelshea.com
For Plaintiff

<4069728q0s011.DOC/NCW>